HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

R.S.A No.1760 of 1982
Date of decision : 18.4.2007

Gian Singh and others **.....Appellants**

versus

Atma Singh and others **.....Respondents**

CORAM : HON'BLE MR. JUSTICE HEMANT GUPTA.

Present : Ms.Alka Sarin, Advocate for the appellants.
Mr.Munishwar Puri, Advocate for the respondents.

* * *

JUDGMENT

HEMANT GUPTA, J. (Oral)

The plaintiffs are in second appeal aggrieved against the judgment and decree passed by the Courts below whereby their suit for possession of the suit land was dismissed.

The undisputed facts are that the plaintiff-appellants are the legal heirs of deceased Sunder Singh natural son of Daya Singh. Sunder Singh was adopted by Taba Singh brother of Daya Singh. The defendants are the legal heirs of Daya Singh. Earlier, the legal heirs of Daya Singh filed a suit for declaration to the effect that the defendants-present appellants are not owners of 1/3rd share of the land measuring 51 kanals 5 marlas and the revenue record, recording Sunder Singh as adopted son of

Taba Singh as owner and mortgagee is illegal and is liable to be corrected. Issue Nos.1 & 2 in the said suit were:-

> *"1. Whether the plaintiffs are the owners in possession of the suit property and whether the defendants have no right, title or interest therein and the entries in the revenue records about the title of the defendants are wrong?*
>
> *2. Whether the plaintiffs have become owners of the 1/3rd share of the land in dispute by adverse possession over a period extending 12 years as alleged in para No.5 of the amended plaint?"*

The said suit was decreed by the learned trial Court on 6.12.1965, but the learned First Appellate Court in its judgment and decree dated 3.5.1967 dismissed the suit by reversing the findings inter-alia holding that the plaintiff has not become owner of the aforesaid 1/3rd share by adverse possession. The said judgment of the learned First Appellate Court was affirmed by this Court in R.S.A.No.624 of 1967 vide judgment dated 30.3.1977. The appellants thereafter, filed the present suit for possession of the aforesaid land in which the defendants again raised a plea that they are in adverse possession of the suit land for more than 12 years. Issue No.4 was framed in the present suit to the following effect:-

> "4. Whether the defendants are in adverse possession of the suit land for more than 12 years as owners thereof as alleged in para No.5 of the preliminary objections and later in para No.2 of the merits of the written statement? OPD."

The learned trial Court relied upon a judgment reported as ***"Rajindera Singh versus Santa Singh and others, A.I.R. 1973-S.C.2537"*** to hold that the previous litigation between the parties does not arrest the running of the period of limitation during the pendency of the previous suit and that there was no bar for the plaintiffs to approach the Court by way of a suit for recovery of possession during the pendency of the previous litigation and, therefore, the present suit is barred by limitation. It was held that the defendants have become owners of the land in dispute by adverse possession. The appeal against the said judgment was dismissed holding that the injunction obtained by the present defendants in the earlier suit that the present plaintiffs were not to interfere in the possession of the defendants, cannot be extended to mean that the plaintiffs were restrained from claiming the suit land by way of filing a Civil Suit for possession. It was found that on 15.1.1964, the defendants have asserted their adverse possession by bringing Civil Suit, but the plaintiffs never instituted any suit for possession in respect of their share in the disputed land. It was also held that the period of limitation can be excluded only if the filing of the suit is stayed by an injunction order. Since the defendants are in continuous possession since the year 1964 onwards, the present suit filed on 28.8.1977 is clearly barred by limitation.

I have heard learned counsel for the parties on the following substantial question of law:-

> "Whether the suit for possession can be said to be barred by limitation when the plea of adverse

possession raised by the defendants was negated in the previous suit?"

In the judgment Exhibit P-2, dated 3.5.1967 the learned First Appellate Court has held to the following effect:-

> "It was then argued by the learned counsel for the plaintiffs that the defendants have never been in occupation of the property and the plaintiffs had become owners by adverse possession. The pleas of adverse possession had been considered by the trial Court and found against the plaintiffs. On a perusal of the record and of evidence placed on the file, I am of the opinion that this plea is not established. Once the name of Sunder Singh was entered in the record as owner, he became a co-sharer with Daya Singh. Jhanda Singh and Harnam Singh sons of Daya Singh had purchased the mortgagee rights and so became mortgagees. Thus, they would be entitled to possession of the property. As far as possession of Sunder Singh was concerned, it is affirmed from copy of the jamabandi Ex.D-8. Here, Sunder Singh and Daya Singh were both in possession of the property under the mortgagee. Possession of one co-sharer will be considered as possession of all co-sharers. In the case of co-sharers mere length of possession would not give any title. The adverse possession should be open and claimed to the knowledge of the other co-sharers. There is no evidence of any such fact in this case. The plea of adverse possession has, therefore, been rightly disallowed."

Once the plea of adverse possession, raised by the defendants, has been negated in the earlier suit, the Courts below could not permit the defendants to raise the plea of adverse possession and to hold that the suit for possession filed by the plaintiffs is barred by limitation. In the previous judgment and decree, the finding recorded is that Sunder Singh and Daya Singh are in possession of the property as co-sharer. The possession of one co-sharer is possession of all the co-sharers. In the case of co-sharers, mere length of possession of one co-sharer would not give any title to the co-sharer in possession. It was found that there is no evidence of the fact that the possession is adverse to the knowledge of other co-sharers. Once such is the finding, the present suit for possession based on title is governed by Article 65 of the Limitation Act, 1963. As per the said Article, it is for the defendants to prove that their possession became adverse to the plaintiffs for the last 12 years.

Learned counsel for the respondents has relied upon the judgments reported as ***Narayan Jivangouda Patil and another versus Puttabai and others, A.I.R.-1945 Privy Council-5; A.S.K.Krishnappa Chettiar and others versus S.V.V. Somiah @ Navniappa Chettiar and others, A.I.R.1964-SC-227; Siraj-ul-Haq Khan and others versus The Sunni Central Board of Wakf U.P. and others, A.I.R.1959 Supreme Court-198; Rajinder Singh and others versus Santa Singh and others, AIR-1973-SC-2537 and P.K Kutty Anuja Raja versus State of Kerala, 1996 (1) Civil Court Cases-694,*** to contend that pendency of the suit filed by the appellants herein, would not arrest the running of the period

of limitation for filing of the present suit for possession. The above said judgments are not applicable in the facts of the present case. It has been held that running of limitation cannot be arrested during the pendency of the earlier suit and that it cannot be interrupted by mere pendency of the suit. There is no dispute about the proposition laid down in the above said judgments in the present suit for possession. In a suit for possession based on tile, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff, but it commences from the date when the defendant's possession becomes adverse. The relevant extract from `***Vasantiben Prahladji Nayak and others versus Somnath Muljibhai Nayak and others, AIR 2004 Supreme Court-1893,*** reads as under:-

> ". . . . . In the case of Hanamgowda vs. Irgowda, reported in AIR 1925-Bom.9, it has been held that in cases of adverse possession, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but it commences from the date when the defendant's possession became adverse. . . . ."

Thus, the finding recorded by the Courts below that it was incumbent upon the plaintiffs to file a suit for possession within 12 years in view of the assertion of the defendants in the previous suit that their possession is adverse, is wholly unjustified. Once the plea of adverse possession has been negated and the possession of the defendants is held to be that of a co-sharer in the previous suit, the possession cannot be said

to be adverse in the present suit. The mere assertion of adverse possession is not sufficient to confer title. The finding recorded is that defendant is co-sharer. Therefore, the suit filed basis the plea of adverse possession raised by the defendants. It is beyond comprehension that the subsequent suit on the basis of tile can be said to be barred by limitation on the plea of adverse possession which has not been accepted in the previous suit. The plea of adverse possession is in fact could not have been raised by the defendants in view of the finding recorded in the previous suit.

In view of the above, the judgments passed by the Courts below suffers from patent illegality and irregularity. The suit for possession filed by the plaintiff cannot be said to be barred by limitation.

Consequently, the present appeal is allowed. The suit is decreed with costs while setting aside the judgment and decree passed by the Courts below.

(HEMANT GUPTA)
JUDGE

April 18, 2007
**mohinder*